No. 23-742

In the Supreme Court of the United States

MILAN KISER AND DIANA KISER,
Petitioners,

v.

CHRIS LANGER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

STEPHEN E. ABRAHAM
Counsel of Record
1592 Pegasus Street
Newport Beach, CA 92660
(949) 878-8608
stephen@abraham-lawoffices.com

MELISSA DAUGHERTY
O'Hagan Meyer
550 S. Hope Street, Ste 2400
Los Angeles, CA 90071
(213) 647-0060

Counsel for Petitioners

SAMY S. HENEIN
Suppa, Trucchi & Henein, LLP.
3055 India Street
San Diego, CA 92103
(619) 297-7330

JAMES S. LINK
215 N. Marengo, 3rd Fl.
Pasadena, CA 91101
(626) 793-9570

PHILIP H. STILLMAN
Stillman & Associates
3015 North Bay Rd, Ste. B
Miami Beach, FL 33140
(888) 235-4279

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PETITION FOR REHEARING

Pursuant to Rule 44.2, Petitioners Milan and Diana Kiser respectfully petition for rehearing of the Court's order denying certiorari in this case.

HISTORIC AND EXTRAORDINARY GROUNDS FOR REHEARING

On March 27, 2023, this Court, for the first time in the history of the Americans with Disabilities Act of 1990, granted certiorari to decide the question at the heart of an irreconcilable division amongst the Circuits – whether a "tester" had standing to sue under Title III of the Act. *Acheson Hotels, LLC v. Laufer*, 144 S.Ct. 18, 217 L. Ed. 2d 155 (2023).[1]

On July 24, 2023, in an act described by many as calculated, the claim was made that the case was moot because the plaintiff had dismissed her case below.

Agreeing, on December 5, 2023, the case was vacated as moot and with its dismissal an "important and recurring question" (*Acheson Hotels*, 144 S.Ct. at 22, 217 L.Ed.2d at 159 (Thomas, J, *dissenting*)) was left unanswered.

Acheson represented but one of tens of thousands of cases filed in the district courts below, thousands of which (as in *Acheson*) relied on the claim of "tester" as a basis for standing. Of those, only a few would ever

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[1] It had been nearly fifteen years earlier that this Court declined the opportunity to engage in similar review of this Constitutional question. *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031 (9th Cir. 2009), *cert denied*, 557 U.S. 929 (2009).

reach the Court of Appeals and far fewer the steps of this Court. And only one passed through the doors so sparingly – and fleetingly – opened.

Tens of thousands of cases over a span of 33 years.

And in every instance where standing was predicated, even in part, on the proposition that a tester could advance such a claim, such construct challenged not simply the boundaries of a cognizable injury but the very limits of the exercise of power enshrined in our Constitution.

Title III of the ADA exists to eliminate discrimination on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation – barriers *to commerce*.

If a court may indulge a claim predicated not on an act of commerce but the desire of a person to inspect – to "test" – then the explicit words of limitation within the ADA have no purpose. And if that be so, then the Congressional power exercised in passage of the ADA – Article I, Section 3, Clause 3 – cannot be justified.

But were that not the result intended, then courts nevertheless, by acquiescence, have conferred upon a party the assumption of a power that neither the courts nor Congress could otherwise confer, to prosecute a claim, the police power to "test" (to inspect), heretofore reserved as confirmed within the Tenth Amendment entirely and exclusively to the states. Such extraordinary power should not be ratified by this Court, certainly not by silence. There can be no equivocation on this point.

The Circuit Courts are divided. And nothing short

of an answer by this Court will mend that divide, confirming "tester" standing is an artful but illegitimate basis for invoking our Courts' jurisdiction that cannot breach the wall set forth at its foundation in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Kiser v. Langer is not simply one case. It is one of thousands – tens of thousands – of which too little if any regard has been given.

If *Acheson* was a reminder of the fragility of this Court's power to review, *Kiser* must represent that moment when a stand is taken and the bedrock principles underpinning our Constitution affirmed by the many decisions of this Court maintaining the balance at the heart of our national compact and the role of our Courts enshrined in Article III, section 2, clause 1 – that no action shall be prosecuted except by a person maintaining at all times a real interest, affected by the outcome, having suffered a cognizable injury, as to which a valid expression of Congressional power has given a remedy.

Shall this Court wait another third of a century? Must tens of thousands new cases in the district courts be left to navigate uncertain waters all the while the important and recurring Constitutional question of standing is left unanswered?

Petitioners submit that now is the time for this Court to exercise discretion and this is *the* case as to which certiorari should be ***granted***

A. District Courts – Where the Thousands of Cases are Litigated – Desperately Need This Court's Intervention to Address the Irreconcilable Conflict

The fact of this Court's granting of cert in *Acheson* was immediately noticed. See, e.g., *Avalon Holdings Corp. v. Gentile*, 2023 U.S. Dist. LEXIS 128471, *12 (SD NY Jul. 25, 2023) "Since *TransUnion* [*LLC v. Ramirez*, ___ U.S. ___, 141 S.Ct. 2190 (2021)], the issue of "tester" standing under the ADA has divided the courts of appeal, and the Supreme Court has granted certiorari in a case raising this question. See *Laufer v. Acheson Hotels, LLC*, 50 F.4th 259, 263 n.1 (1st Cir. 2022), *cert. granted*, 143 S. Ct. 1053, 215 L. Ed. 2d 278 (2023)."

But as noticed as was the grant of cert was the dismissal and the effects that dismissal would have on the District Courts.

Even after the "mass" dismissal by Laufer of her underlying cases, the confusion of disparate outcomes with respect to the standing analysis applied to "testers" did not end and, with it, conflicting decisions continue to be issued by district courts as had occurred even during the pendency of *Acheson* after this Court granted cert.

Decided only weeks ago, the district court in *Garcia v. MVB Real Est. Inv., LLC*, 2024 U.S. Dist. LEXIS 18437 (SD Tx Feb. 2, 2024) denied a motion to dismiss, concluding "[a] so-called 'tester' may have standing to bring a Title III case."

And more unequivocally stated, the district court in *Taylor v. Grayson & Assocs.*, 2023 U.S. Dist. LEXIS 213203 (ND Al Nov. 30, 2023), went so far as to

partially deny a motion to dismiss in light of the "Eleventh Circuit recogniz[ing] standing based on 'stigmatic injury' solely based on experiencing discrimination, *regardless of whether the plaintiff intends to actually use the services at issue*." *Taylor*, 2023 U.S. Dist. LEXIS 213203, *12, 2023 WL 8284377 (emphasis added). As the court explained in a footnote,

> "In a recent published opinion, the Eleventh Circuit explicitly held that Sierra confers standing on a tester like the plaintiffs in Smith and Harty because experiencing discrimination is enough to confer an actionable stigmatic injury. *Laufer v. Arpan LLC*, 29 F.4th 1268 (11th Cir. 2022). However, the parties to that case later informed the court that 'the case was moot—and, indeed, that it had been moot at the time of [the] decision.' *Laufer v. Arpan LLC*, No. 20-14846, 77 F.4th 1366, 2023 WL 5209551, at *1 (11th Cir. Aug. 15, 2023). The Eleventh Circuit therefore vacated its earlier decision. *Id.* Nevertheless, *the undersigned finds the analysis in Laufer to be persuasive and an accurate statement of the law in this circuit*."

Taylor at *12 (emphasis added).

What is extraordinary about the analysis in *Taylor* was the keen awareness of the precise posture of Acheson, nearly in "real time." Equally extraordinary, a district court in the Eleventh Circuit – one of the circuits aligned with those supporting tester status – affirmed the vitality of "tester" status despite the plaintiff having no interest in being a patron, a position unreconcilable with those in other districts.

And taking a diametrically opposing position, a decision from New York's Southern District highlights the conflict. See, *Fontanez v. Valley Lahvosh Baking Co.*, 2023 U.S. Dist. LEXIS 149437, *8 (SD NY Aug. 22, 2023) (dismissing complaint based on lack of standing), citing and quoting *Laufer v. Dove Hess Holdings, LLC*, No. 20-CV-379, 2020 U.S. Dist. LEXIS 246614, 2020 WL 7974268, at *11 (N.D.N.Y. Nov. 18, 2020) ("[W]here a tester plaintiff discovers and is offended by ADA violations on a website, but that website has no actual, specific relevance to that particular plaintiff beyond the plaintiff's desire to seek out and remedy ADA violations, no concrete and particularized injury has been alleged.")

Conflicts such as those highlighted by the District Courts in *Taylor* and *Fontanez* will continue until this Court intervenes.

B. Too Few Cases Make Their Way Through the Courts of Appeals to Risk Waiting Someday for Some Other Case

Perhaps there was fault to be found in the relative speed with which this case appeared, seemingly out of nowhere, in the immediate aftermath of *Acheson's* dismissal. After all, giving the impression that there is always *another case in the wings*, this Court might have been tempted to pass on this case with the expectation that another would as quickly appear.

But waiting for another – a better – case is anything but a prudent approach to this serious conflict.

As initially noted, in the 33 years since passage of the ADA, only once has a Title III case attracted the attention of this Court, albeit all too briefly before being expelled.

Before then, there was only *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031 (9th Cir. 2009), *cert denied*, 557 U.S. 929 (2009).

Apart from *Acheson*, none have come close and tens of thousands never get beyond the district courts. The simplest reason for this, simply stated, can be called litigation exhaustion.

The typical defendant in a Title III ADA case is a small business owner and not a business with deep pockets and the desire or ability to pursue every possible avenue of appeal.

Just beyond the District Courts but seemingly a world away are the Courts of Appeals. And there, the statistics are remarkable for how few cases reach that point.

As reported by the Judicial Council of the Ninth Circuit Court of Appeals, in 2022, there were 41,085 civil filings. In that same year, there were only 2,010 private civil appeals.[1]

At a national level, the numbers suggest an even greater expanse between the district and appellate courts. As reflected in reporting for the 12-month period ending June 30, 2023, there were 38,170 private civil rights cases filed in all the federal district courts. In that same period, there were only 3,529 private civil rights appeals other than employment in all the Courts of Appeals.[2]

Depicted another way, the current of private civil

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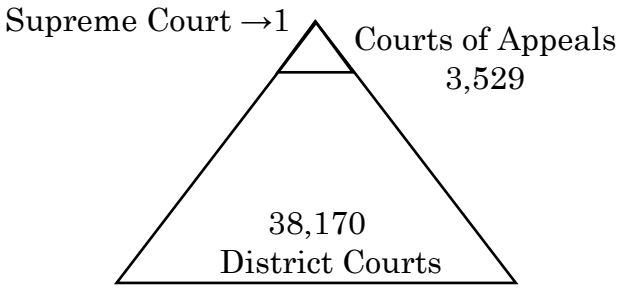
[1] https://cdn.ca9.uscourts.gov/datastore/judicial-council/publications/AnnualReport2022.pdf

[2] https://www.uscourts.gov/statistics/table/c-3/statistical-tables-federal-judiciary/2023/06/30.

rights cases, including all claims brought under Title III of the ADA, would appear as follows:



This Court might wait years, even a decade or more, before another case comes knocking at the door, all the while *tens of thousands* of cases will be filed in the District Courts *each year* repeatedly raising the fundamental question of standing but as to which no uniform answer will be forthcoming.

And so long as *Langer v. Kiser* remains the "law of the land," certainly in the Ninth Circuit, the busiest Circuit in the country,[3] this Court's decisions in *Lujan* and *TransUnion* will serve no check against a virtually limitless tester class, far beyond the limits of standing contemplated under the ADA and the Constitution.

CONCLUSION

The important question of who may sue under the ADA and, as importantly, who may not sue has been left unanswered for one third of a century.

There is no case in the wings, no reason to leave the critical question of standing unsettled, and no

[3] Joining the Eleventh Circuit if *Taylor* is any indication.

reason to permit the division in the Circuits to persist.

The Circuits, hopelessly divided, and the District Courts, left without clear direction, need an answer – one that can be provided given the case that now stands before this Court.

On the basis of the foregoing, the Petition for Rehearing and Petition for Writ of Certiorari should be ***granted***.

Respectfully submitted.

STEPHEN E. ABRAHAM, ESQ.
Counsel of Record
1592 Pegasus Street
Newport Beach, CA 92660
(949) 878-8608
stephen@abraham-lawoffices.com

SAMY S. HENEIN, ESQ.
Suppa, Trucchi & Henein, LLP.
3055 India Street
San Diego, CA 92103
(619) 297-7330

JAMES S. LINK, ESQ.
Counselor & Advocate at Law
215 N. Marengo, 3rd Floor
Pasadena, California 91101
(626) 793-9570

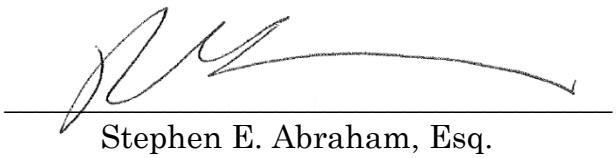
MELISSA T. DAUGHERTY, ESQ.
O'Hagan Meyer
550 S. Hope Street, Suite 2400
Los Angeles, California 90071
(213) 647-0060

PHILIP H. STILLMAN, ESQ.
Stillman & Associates
3015 North Bay Road, Suite B
Miami Beach, Florida 33140
(888) 235-4279

MARCH 2024

CERTIFICATE OF COUNSEL

Pursuant to Rule 44.2, Rules of the Supreme Court, counsel hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44.2, Rules of the Supreme Court, and is being presented in good faith and not for delay.



Stephen E. Abraham, Esq.